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No. 85-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HUMANA INC. *et al.*,
Petitioners,

v.

OTIS M. BOWEN, M.D.,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES *

Page

Cases:

American Medical International, Inc. v. Secretary of Health, Education and Welfare, 466 F. Supp. 605 (D.D.C. 1979), *aff'd,* 677 F.2d 118 (D.C. Cir. 1981) 3

FPC v. Natural Gas Co., 315 U.S. 575 (1942) 2

Hospital Authority v. Heckler, 707 F.2d 456 (11th Cir. 1983) 2

St. Francis Hospital Center v. Heckler, 714 F.2d 872 (7th Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984) 2,3

Sun Towers, Inc. v. Heckler, 725 F.1d 314 (5th Cir. 1984) 3

Statutes:

42 U.S.C. § 1395x(v)(1) 3

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* A list of all parties and subsidiary corporations of Humana Inc. is set forth at page (ii) of the Petition for Writ of Certiorari.

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REPLY MEMORANDUM FOR PETITIONERS

In his brief in opposition to Humana's Petition for Certiorari, the Secretary misinterprets Humana's claim that the decision of the court of appeals conflicts with previous decisions of the Court. Further, the Secretary

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* Otis M. Bowen, M.D. has been substituted as respondent for Margaret M. Heckler as the successor Secretary of Health and Human Services. *See* Sup. Ct. Rule 40.3.

erroneously introduces two sets of cases to suggest that the decision below need not be reviewed.

1. The Secretary suggests that, because Humana's sale of hospital services to Medicare patients is voluntary, the Fifth Amendment's guarantee of just compensation is inapplicable. Respondent's Brief at 7, n.6, *citing St. Francis Hospital Center v. Heckler,* 714 F.2d 872 (7th Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). Unlike the *St. Francis* hospitals, however, Humana acknowledges that no constitutional right is in question.

Instead, Humana contends that, consistent with the Court's interpretation of the Natural Gas Act in *FPC v. Natural Gas Co.,* 315 U.S. 575 (1942), the "reasonable cost" standard in the Medicare Act must be interpreted to be co-extensive with just compensation principles. Therefore, the statute itself dictates that these costs be reimbursed. This principle was clearly established in *FPC v. Natural Gas Co.,* but was not followed by the court below.

2. The Secretary has introduced a series of appellate decisions in which charitable hospitals sought the same return on equity capital paid to investor-owned facilities. *E.g.,* Respondent's Brief at 5-6, *citing St. Francis Hospital Center v. Heckler, supra; Hospital Authority v. Heckler,* 707 F.2d 456 (11th Cir. 1983). The courts in those cases properly concluded that Congress intended to depart from historic practices in developing reimbursement principles for *nonproprietary* hospitals. *E.g., St. Francis v. Heckler, supra,* 714 F.2d at 872. Those decisions, however, are not relevant in assessing whether *investor-owned* hospitals are entitled to a return on equity capital as a "cost" of care under subsection (A) of 42 U.S.C. § 1395x(v)(1). The Seventh Circuit itself limited the scope of its decision:

> . . . Congress did not intend a return on equity capital for nonproprietary providers to be

> reimbursable as a "reasonable cost" under 42 U.S.C. § 1395x(v)(1)(A). Any ambiguity we find goes to the issue of whether proprietary hospitals are entitled to such a return under either § 1395x(v)(1)(A) or (B), *an issue we need not decide at this point.* 714 F.2d at 875 (emphasis added).

3. The other group of decisions relied on by the Secretary includes cases in which proprietary facilities have sought reimbursement for costs attributable to their investor-owned status. In some of those cases the courts indiscriminately relied on decisions such as *St. Francis* involving charitable institutions, with absolutely no evaluation of whether those principles should be extended to proprietary facilities. *E.g., Sun Towers, Inc. v. Heckler,* 725 F.2d 314, 335 (5th Cir. 1984), *cert. denied,* No. 83-1867 (Oct. 1, 1984), *citing St. Francis v. Heckler, supra.*

In the other cases, proprietary hospitals have argued that the 1966 amendment to the Medicare Act, which established the formula-prescribed guarantee of return on equity capital for investor-owned nursing homes, mandates reimbursement of all proprietary costs incurred by investor-owned hospitals. *E.g., American Medical International, Inc. v. Secretary of Health, Education and Welfare,* 466 F. Supp. 605 (D.D.C. 1979), *aff'd,* 677 F.2d 118 (D.C. Cir. 1981). Those courts quite properly concluded that the nursing home amendment regarding a return on equity capital could not be used as a "bootstrap" for other claims of investor-owned hospitals. *E.g.,* 466 F. Supp. at 613. Those decisions cannot serve, however, as the basis for rejecting Humana's claim that these expenses constitute "costs" under the 1965 Act as originally written.

CONCLUSION

The legislative history of the Medicare Act relied upon by Humana indicates that Congress itself intended to continue the historic practice of recognizing the costs of private capital of proprietary hospitals as compensable costs of services. Therefore, before this drastic departure from historic practice is implemented, Humana respectfully requests that the Court review this issue.

Respectfully submitted,

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